the strict rule been applied, the mere outbreak of war would have dissolved the partnership automatically. The court held that since an Act of Congress and a Proclamation were provided, the necessary intendment was that commercial intercourse should be legal until expressly prohibited.

The principal case is silent upon the subject of The Hague conventions and the contraband nature of the goods in question. The English blockade of German ports, thereby attempting to cut off all her commerce, may have had an influence upon the decision, but the case admirably illustrates the statement of Mr. Hershey,[31] one of the many modern writers who favor the more liberal rule, that "the main obstacles to the growth of a more enlightened practice would seem to be the existence of a number of contrary precedents embalmed in case law and the hide-bound conservatism of Anglo-American courts, which manifests itself in this as in every other branch of jurisprudence." [32]

P. C. W.

JURORS—IMPEACHMENT OF VERDICT—Prior to the year 1785, when improper conduct on the part of a jury was urged as ground for a new trial, it was customary to admit the testimony or affidavits of jurors or others without much discrimination.[1] Such evidence was naturally regarded with a certain suspicion, and its sufficiency was often successfully contested,[2] but its admissibility was not seriously questioned. In the year 1785, however, the attitude of the courts on this subject underwent an important change. Lord Mansfield, in the leading case of *Vaise* v. *Delaval* [3] laid down the broad rule that for the purpose of securing a new trial, affidavits or testimony of jurors were inadmissible. As a result of the prestige of Lord Mansfield and the respect accorded his decisions, courts were not slow in adopting the rule of *Vaise* v. *Delaval,* and it became the prevailing rule both in England and America.[4]

Recently this subject came for the third time before the Supreme Court of the United States in *McDonald* v. *Pless,*[5] a case forcefully illustrative of the inherent injustice of the so-called "quotient verdict." The plaintiffs, attorneys, were suing for the value

[31] Hershey: Essentials of International Public Law, § 349.

[32] See Westlake: International Law, War, pp. 44-51; Holtzendorff: *Handbuch,* vol. 4, 358 ff.; Mance: *La Déclaration de Guerre* (1909), chap. 11.

[1] Lord Fitzwater's Case, Freeman K. B. 415 (Eng. 1675); Wellish v. Arnold, Bunbury 51 (Eng. 1719).

[2] Prior v. Powers, 1 Keb. 811 (Eng. 1665).

[3] 1 T. R. 11 (Eng. 1785).

[4] Straker v. Graham 4 M. & W. 721 (Eng. 1839); Cluggage v. Swan, 4 Binn. 150 (Pa. 1811).

[5] 238 U. S. 264, 35 Sup. Ct. 783 (1915).

of legal services rendered. It was agreed among the jury that each member should write down the sum to which he thought the plaintiff was entitled, and that the verdict returned should be one-twelfth part of the aggregate. The amounts written down ranged from nothing to five thousand dollars. To the quotient, two thousand nine hundred dollars, objection was made by several of the jurors who thought the amount excessive; but they yielded to the argument that they should stand by their agreement, and a verdict for that amount was returned. The court, in excluding the testimony of a juror sworn as a witness, said: "There is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict." [6]

Notwithstanding the fact that the decision of Lord Mansfield has been followed almost universally, its wisdom has not escaped severe criticism. Its origin is attributed by Professor Wigmore to the old doctrine, long since discarded, that no witness shall be heard to allege his own turpitude,[7] and this consideration appears to have influenced the courts in some of the early American cases.[8] He couches his criticism in the following terms: "A bailiff or other court officer, who may have been present at the jury's deliberations, may by universal concession prove their misconduct, though it is a gross breach of duty (except in one or two jurisdictions) for him to attend or overhear. Thus, not only does the rule tempt the parties to seduce the bailiffs to tricky expedients and surreptitious eavesdroppings; but the law, furthermore, while with one hand it sanctimoniously puts away the juryman who reports his own misconduct done during the privacy of retirement, yet with the other hand inconsistently invites to the same witness-stand the bailiff whose shameless disregard of his duty, in intruding upon that privacy, forms his own qualification as a witness, and the sole tenor of his testimony. If there cannot be any principle in this rule, it rule, it should at least possess logic."[9]

[6] See opinion of Lamar, J., at p. 785.

[7] Wigmore: Evidence, vol. IV, § 2352: "Here it [the doctrine *nemo turpitudinem suam allegans audietur*] thrived,—apparently because new supposed reasons of policy were found, which buoyed up Lord Mansfield's rule long after the general repudiation of that favorite maxim, which had for him served apparently as its only justification."

[8] See opinion of Yeates, J., in Cluggage v. Swan, *supra,* note 4: "Jurors, who would have been sworn or solemnly affirmed to give a verdict according to the evidence, come with a bad grace into a tribunal of justice to prove their own dishonorable conduct, and affix a stigma on their companions who may be unheard in their defence."

[9] Wigmore: Evidence, vol. IV, § 2353, apropos to following statement of Lord Mansfield in Vaise v. Delaval, *supra,* note 3: "The Court must derive their knowledge from some other source, such as some person having seen the transaction through a window or by some other means."

It is interesting to observe that only a few courts have broken away from the rule of *Vaise* v. *Delaval.* The dissenting courts have placed as the criterion of admissibility in the case of such affidavits the test whether or not the facts averred essentially inhere in the verdict itself. Under this rule such averments as that a juror misunderstood the instructions of the court, or was mistaken in his calculations or judgment, or was unduly influenced by some evidence or remark is excluded, while no objection is made to averments that the verdict was a "quotient" one or the result of chance. The argument in favor of such a rule can scarcely be better expressed than in the language of the Iowa court in adopting it:[10] "To allow a juror to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the importunities and appliances of parties and attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow-jurors; and to bear such proof would have a tendency to diminish such practices and to purify the jury-room, by rendering such improprieties capable and probable of exposure and consequently deterring jurors from resorting to them."[11]

The case under discussion assumes a peculiar interest inasmuch as the attitude of the Supreme Court on this subject has not been entirely clear. In *Hyde* v. *United States,*[12] the last time in which the question came before that court for determination, the misconduct alleged was a compromise between a faction of the jury favoring acquittal and one favoring conviction, whereby the conviction of one defendant was exchanged for the acquittal of the other. In excluding the testimony of a juror to that effect, the court said: "We think the rule expressed in *Wright* v.

[10] Wright v. Illinois Telegraph Co., 20 Ia. 195 (1866).

[11] This rule is followed in Perry v. Bailey, 12 Kan. 539 (1874); Harris v. State, 24 Nebr. 803 (1888); and Elledge v. Todd, 1 Humph. 43 (Tenn. 1839). In several western states statutes or codes make an express exception to the English rule in the case of verdicts which are the result of a resort to chance. See Cal. Code, Civ. Pro., § 657; Idaho Code C. P. 3524; Gordon v. Trevarthan, 13 Mont. 387; Gaines v. White, 1 S. Dak. 434; Texas Code, Crim. Pro. 1895, § 817, par. 8; People v. Ritchie, 12 Utah 180; Ark. Dig. Stat. 1904, § 2422. A "quotient verdict" has been held a "chance" verdict within the meaning of such statutes; Dixon v. Pluns, 98 Cal. 384 (1893).

[12] 225 U. S. 347 (1911).

[13] *Supra,* note 10.

Illinois Telegraph Co.[13] should apply, that the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of jurors and can receive no corroboration." The Supreme Court would appear in this case to have adopted the rule of the Iowa case. Yet the Iowa court, under the rule laid down, admitted evidence to show a "quotient" verdict while in *McDonald* v. *Pless,* the case under discussion, such evidence was excluded. The court did, however, say that there might be instances occurring in the gravest and most important cases in which such testimony could not be excluded without "violating the plainest principles of justice"; but it held that the present case did not warrant a departure from the general rule. By this decision it would appear that the formerly approved rule of *Wright* v. *Illinois Telegraph Co.* was repudiated and the whole subject of admissibility of such affidavits intrusted, to some extent at least, to the discretion of the court.

As a matter of general policy it is suggested, in view of the injustice to the party aggrieved by the jury's misconduct which the broad rule of *Vaise* v. *Delaval* necessarily entails, that, if possible, it ought to be relaxed.[14] In *McDonald* v. *Pless* it is admitted that, viewed from the standpoint of the party aggrieved, the argument in favor of receiving such evidence is unanswerable. It is undeniable that a number of the evils designed to be overcome by the broad rule of exclusion are more than imaginary, and that it shuts off a horde of frivolous reasons which are invaribly urged under a less stringent rule,[15] and it is admitted that situations may arise where the application of the rule of *Wright* v. *Illinois Telegraph Co.* might prove difficult. But it is submitted that the Iowa rule, while protecting to a much greater extent the rights of the party injured by the misconduct, violates no fundamental consideration of public policy. While it is readily conceded that to admit reasons lying "in the breast" of individual jurors, in their nature incapable of being con-

[14] A curious situation arose in the case of Dorr v. Fenno, 12 Pick. 520 (Mass. 1832). In that jurisdiction after the jury have returned with their verdict but before they are discharged, and while they are still a jury, the court may interrogate them as to the grounds upon which they based the verdict. In an irrelevant answer to a question put by the court, a juror disclosed that a "quotient verdict" had been resorted to. The court said: "The jury may have been guilty of misbehavior, but if so, we have no evidence of it, and can derive none from them." Obviously, although the information was volunteered as a juror and not as a witness, the chief justification of the rule, that it prevents jurors from being besieged and annonyed after the trial is concluded, was here absent.

[15] A recent Washington case demonstrates the frivolous reasons which lax rules as to admissibility would invite. Affidavits averred, *inter alia,* that one of the jurors, an elderly lady, was ill and agreed because of her illness; that one juror stated that, when the case was tried upon a former occasion, the trial judge granted a nonsuit; and that one of the jurors signaled from the jury room to a woman in another office. All these affidavits, together with counter-affidavits, appear to have been admitted by the trial court, which refused a new trial. The refusal was sustained on appeal. Lindquist v. Pacific Coast Coal Co., 150 Pac. 619 (Wash. 1915).

troverted, would lead to imposition and abuse, the admission of an affidavit as to an overt act, observed by all the jurors, such as a "quotient verdict," which, if false, can be refuted by counter-affidavits, is not open to the same objections. The possibility that jurors should be induced, or even importuned, by the losing party to make false affidavits as to a fact which the entire jury knows, seems remote It is submitted that with due regard for the rights of the individual litigant, unless it contravene some principle of paramount public policy, such evidence should be admitted; and that no substantial consideration of public policy is violated by the Iowa rule.

B. M. K.

LARCENY—FINDING OF LOST OR MISLAID GOODS—The question of under what circumstances the finder of goods may be guilty of larceny, has not been answered by the courts as clearly or with as complete unanimity as might be desired.

That the finder of lost, as well as of mislaid, goods may be guilty of theft under certain conditions is a proposition well settled;[1] and all the authorities apparently agree that there is a clear distinction between property merely mislaid, *i. e.,* put down and left in a place by mistake, and property lost.[2] This distinction is illustrated by the different rules usually applied to the finder of lost goods and to the finder of mislaid goods. In order to establish the charge of larceny against the former, it is necessary to prove that at the time of the finding, he had the felonious intent of appropriating the article to his own use,[3] and this depends upon whether he knew or had reasonable means of ascertaining the owner of the lost article.[4] On the other hand, in the case of mislaid property it is sufficient to prove that the finder had the felonious intent to misappropriate the article at any time, subsequent to, as well as coincident with, the finding.[5]

It therefore is of practical interest to discover the true distinction between goods lost and goods mislaid. That this is not always

[1] Ransom v. State, 22 Conn. 153 (1852); Com. v. Titus, 116 Mass. 42 (1874); Brooks v. State, 35 Ohio St. 46 (1878). It has, indeed, been held that lost goods, as distinguished from mislaid goods, cannot be the subject of larceny. 1 Hawk. P. C. 33, § 3; Lawrence v. State, 1 Hump. 228 (Tenn. 1839). *Cf.* Moorehead v. State, 9 Humph. 635 (Tenn. 1849), where a distinction is drawn between lost inanimate property and lost animate property, the latter being regarded as a possible subject of larceny.

[2] Reg. v. West, 6 Cox, C. C. 415 (Eng. 1854).

[3] Reg. v. Thurborn, 1 Den., C. C. 387 (Eng. 1849). The doctrine there laid down, that if the original taking was without a felonious intent, though followed by a felonious intent afterwards, the finder of lost goods is not guilty of larceny, has been assailed, Russell: Crimes, 4th Ed., Vol. II, p. 180, note *t,* but is now well established. Reg. v. Christopher, 32 L. T. Rep. 150 (Eng. 1858); Brewer v. State, 125 S. W. Rep. 127 (Ark. 1910). See 7 AM. LAW. REG. 381.

[4] Reg. v. Christopher, *supra,* note 3. State v. Pusey, 88 S. C. 313 (1913).

[5] Wynne's Case, 2 East, P. C. 664 (Eng. 1786); Regina v. Pierce *et al.,* 20 L. T. Rep. 182 (Eng. 1853); Griggs v. State, 58 Ala. 425 (1877).